

Liberalism and Religion: Against Congruence

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I argue here against recent trends in liberal and feminist theory contending that the state should insist that religious groups internalize liberal justice and equality. Doing so dangerously ascribes too much power to the state, and threatens liberty and stability. I argue instead that the liberal state must balance different values. I begin by claiming that while Rawls worries that religious people want to impose their way of life on others, a more accurate concern is that of liberalism imposing its way of life on religious conservatives. I also contend that Rawls's concern about stability leads him wrongly to think that there must be widespread agreement on the principles of justice, which leads to considerable intrusion in conservative religions. This widespread agreement is unattainable; a better route to stability is through extensive agreement on decision making procedures. Feminist arguments are less concerned with stability, but share with Rawls the idea that private values should be congruent with public ones. I argue that doing so leads to unacceptable intrusions on liberty. Religious groups can be internally non-liberal as long as there is pluralism within the society, exit from groups is assured, and their members all receive a decent education.

INTRODUCTION

Much of the current debate about religion and liberalism has been argued through an inadequate framework established by John Rawls. For Rawls,

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religion is "a comprehensive way of life," which means that religion informs people about how to live their lives. It is not just a doctrine of attending church once a week, but rather prescribes nearly every aspect of people's lives by providing a code or morality. The problem, as Rawls sees it, is that many religions want this morality sanctioned and imposed by the state as well. The project of *Political Liberalism*¹ is, in part, an argument for how religious people can retain their comprehensive views while agreeing to a shared political conception of justice, so no one religion is able to impose its doctrine on others. Rawls argues for a conception of justice that is also stable; and for Rawls, stability means that all citizens (or all reasonable citizens) can agree on justice. The move Rawls makes from *A Theory of Justice*² to *Political Liberalism* is to try to narrow the scope of justice, in order to widen agreement on it.

Rawls, however, is not successful in this attempt. Despite his best efforts, his conception of justice keeps expanding. The problem that results is the opposite of that which worries Rawls. Rawls worries that advocates of comprehensive views of religion will want to impose their views on others, but in fact it is his comprehensive view of justice that is in danger of imposing itself on religion. Liberal views of justice are much more imperialistic than most religions. Most religions (with some exceptions) realize that they cannot impose their views on others. In Western liberal democracies, many religious people want to be able to live by their own practices. They are less interested in imposing their views on outsiders (though some are), and are more interested in being able to adhere to their own rules.

I will argue here that the Rawlsian framework leaves little space for these people, and as a result, his aspiration for justice is stymied. The issue I want to focus on here — when can liberal democracies allow members of religions to live by their own practices? — is only briefly flagged by Rawls, mostly to note that some religions will be unable to survive in the modern world. Rawls fails to see how his emphasis on justice leaves little room for religious conservatives, despite his arguments that political liberalism is hospitable to a range of comprehensive views. Indeed, the idea of society being governed by one triumphant value, justice for Rawls, can only occur by sacrificing other important liberal values including toleration, liberty and stability. I will argue that to retain the idea of stability we must constrain justice, and keep it in the public sphere, though doing so may certainly affect private values. After discussing Rawls, I will turn toward feminism, which

1 JOHN RAWLS, *POLITICAL LIBERALISM* (1999).

2 JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

takes better notice of conservative religious practices than Rawls. Yet here too I will argue that the desire for one triumphant value is too relentless and tyrannical. The consequences of pushing for too much congruence between public forms of justice or equality and private rules devoted to some other good are dangerous and push liberalism in intolerant directions that are best avoided.

I. RELIGION AS THE PURSUIT OF TRUTH

The key question of political liberalism, according to Rawls, is: "How is it possible for there to exist over time a just and stable society of free and equal citizens, who remain profoundly divided by reasonable religious, philosophical and moral doctrines?"³ Rawls's starting point is the wars of religion that began after the Reformation; the historical origins of liberalism is the "Reformation and its aftermath," where "the modern understanding of liberty of conscience and freedom of thought began."⁴ This leads to the Rawlsian project: how can people with different faiths, all of whom want others to believe as they do, live together in a just society? What people need to do, Rawls maintains, is to realize the impossibility of reaching agreement on the truth of comprehensive doctrines. This leads to Rawls's definition of the unreasonable, defined as those who "insist that their beliefs alone are true."⁵

By conceiving of religion as a matter of belief, the Rawlsian framework simply overlooks or downplays much of the real tension between liberalism and religion, which is at the level of practice. Many liberals argue that they are sympathetic to religion, but then argue away many religious practices. Rawls suggests that the main task of political philosophy is to determine how a variety of comprehensive beliefs can readily co-exist, since each wants to impose its view of truth on the others. Furthermore, Rawls conceives of justice in terms of laws that are readily applicable to all. Public reason about justice would then focus on issues of basic liberties, equality of opportunity, ideals concerning income distribution and taxation and so on.⁶ This leads to a large debate about whether religious views should be able to inflect public reason.⁷ If public reason is about matters that affect all citizens, Rawls and his

3 RAWLS, *supra* note 1, at 4.

4 *Id.* at xxiv.

5 *Id.* at 61.

6 JOHN RAWLS, *The Idea of Public Reason Revisited*, in *THE LAW OF PEOPLES WITH THE IDEA OF PUBLIC REASON REVISITED* 144 (1999).

7 An abbreviated list would include Robert Audi, *The Separation of Church and State*

supporters argue, then it cannot be inflected with comprehensive or religious views, since to do so would be to try to impose one's version of truth on others.

What many religious people want, however, is not only the freedom to believe as they wish in liberal democracies, but the social space to follow particular practices. They may want their marriages (and divorces) regulated by religious law; they want to eat kosher food or halal meat; they want their members to dress modestly, which often causes trouble in public schools; they frequently want to pray communally, and not just weekly. They generally do not aspire to impose their comprehensive way of life on others. In some places, some religious people do want to impose their beliefs on others, but in the West, the setting for Rawls, the percentage of people who want to do so are relatively few.

Devout people who want to live by traditional rules do not necessarily have to reject Rawls's two principles of justice. One could conceive of devout Muslims or Jews or Christians who believe in liberty and think that economic inequality should benefit the least advantaged. They may also believe that people should be able to voluntarily constrain their own liberty — so women and men can choose marriages where divorce is hard to obtain, and harder for women than for men. They may insist that their children wear modest dress in schools, even in physical education classes. They may think that communal prayer on a regular basis is important. Their practices may lead them to shun certain foods and embrace others, which may lead to social divisions between group members and others. Perhaps crucially, they may want to ensure that their children receive the kind of education that will make it likely for their children to remain within their faith.

Conservative religious practices are nearly invisible to Rawls partly because he conceptualizes religion as a matter of belief. And indeed, if this is the case, religion can easily be privatized. If religion is a matter of what sort of God one believes in, or how one prays in church, then there is considerable space for believers to be able to also believe in liberalism.

and the Obligations of Citizenship, 18 PHIL. & PUB. AFF. 259 (1989); ROBERT AUDI & NICHOLAS WOLTERSTORFF, RELIGION IN THE PUBLIC SQUARE: THE PLACE OF RELIGIOUS CONVICTIONS IN POLITICAL DEBATE (1997); STEPHEN CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION (1993); KENT GREENAWALT, PRIVATE CONSCIENCES AND PUBLIC REASONS (1995); KENT GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE (1988); MICHAEL PERRY, LOVE AND POWER: THE ROLE OF RELIGION AND MORALITY IN AMERICAN POLITICS (1991); A. JAMES REICHLEY, RELIGION IN AMERICAN PUBLIC LIFE (1985); and RONALD F. THIEMANN, RELIGION IN PUBLIC LIFE: A DILEMMA FOR DEMOCRACY (1996).

Rawls argues that some comprehensive doctrines might find themselves with little space in a liberal society because their ways of life conflict with the principles of justice. Rawls also suggests, rather briefly, that some religious sects will also have a hard time surviving in the modern world because their beliefs lead them away from being fully cooperating members of society. These religious sects oppose the "culture of the modern world."⁸ In other words, Rawls thinks of religion in mainline Protestant terms — as a matter of belief. Other sorts of religions, he suggests, are simply relics from older eras and do not fit in the modern world and are therefore likely to diminish; not necessarily because their doctrines clash with his principles of justice, but because their practices are out of step with modernism.

Some groups do reject, to some degree, the culture of the modern world. Yet small and insular groups like the Amish and Hutterites are hardly much of a challenge to liberal societies, and are not necessarily at the forefront of the tensions between religion and liberalism.⁹ Most religious conservatives do not reject the culture of the modern world, however: many such religious individuals readily use modern technology, embrace modern education, want their children to learn modern science, and so on. They may also want their children to learn about their religious traditions, and want some separation between men and women in certain settings. The idea that some people may aspire to live by the rules of a traditional religion in the modern world, as opposed to those who really want to live in a different era, is not a possibility that Rawls considers. Rawls does say that he uses religions that reject the modern world as an example, but doing so does not present us with an ideal type that illuminates other sorts of groups. The page and a bit that Rawls devotes to the issue in *Political Liberalism* is certainly not enough to explore the issue in any kind of depth.

II. THE TROUBLE WITH JUSTICE

The problem that religions pose for many theories of liberalism is their often ambiguous relationship to liberal ideals. Many religions, and I refer here to their conservative interpretations, believe in religious toleration but are less enamored with social equality; they are generally hierarchically structured. They believe the family is a crucial institution, and want to protect it from

⁸ RAWLS, *supra* note 1, at 199.

⁹ JEFF SPINNER, *THE BOUNDARIES OF CITIZENSHIP: RACE, ETHNICITY AND NATIONALITY IN THE LIBERAL STATE* 87-112 (1994).

state interference in most cases. They want to educate their children in certain ways that a liberal state will often find troubling. Liberal principles in many cases will point us in different directions with regard to religion: it is not only that equality, toleration and autonomy may be viewed differently, but that there may be tensions internal to each ideal. The autonomy of parents to raise their children according to their beliefs may clash with the ideal of raising a child to be autonomous, depending on how autonomy is defined. Toleration and equality will often pull in different directions, as might toleration and autonomy. Yet how can autonomy work without a robust sense of toleration?¹⁰

The complexity of religion and liberalism, however, is overlooked by Rawls, not only because he so blithely dismisses the importance of traditional religions in the modern world, but because he is insistent that justice must guide society's institutions *and* people's beliefs. Rawls argues that any theory of justice must also be stable. Stability, he maintains, is an issue that is rarely discussed in moral philosophy, yet nonetheless he views it as a fundamental one, which serves as his motivation for writing *Political Liberalism*.¹¹ Rawls argues that citizens need to agree on a political conception of justice for society to be stable: a well-ordered society, he says, is one where "everyone accepts, and knows that everyone else accepts, the very same principles of justice."¹² A stable and legitimate regime has a conception of justice that is acceptable to citizens that are reasonable and rational.¹³ The problem with part III of *A Theory of Justice* (and the reason for *Political Liberalism*) according to Rawls is that it argued for a comprehensive liberalism; part III suggested that citizens of a just regime would converge on many virtues that were not only political but also private.¹⁴ Since many people could reasonably be expected not to agree on these virtues, they would not accept the regime; if the regime's notion of justice is rejected by many citizens, then instability will reign. Rawls wants to avoid a regime that reaches stability through coercion, since coercive regimes are not legitimate. Rawls therefore argues that the route to agreement is likely only if the scope of agreement needed on justice is narrowed.

10 On liberal pluralism generally, see ISAAH BERLIN, *FOUR ESSAYS ON LIBERTY* (1969). More recently, see WILLIAM A. GALSTON, *LIBERAL PLURALISM: THE IMPLICATIONS OF VALUE PLURALISM FOR POLITICAL THEORY AND PRACTICE* (2002), and JEFF SPINNER-HALEV, *SURVIVING DIVERSITY: RELIGION AND DEMOCRATIC CITIZENSHIP* (2000).

11 RAWLS, *supra* note 1, at xvii.

12 *Id.* at 35.

13 *Id.* at 140-44.

14 *Id.* at xvii.

Yet Rawls's attempt to narrow the scope of justice falters. This failure is highlighted by his arguments on the family. Susan Okin pressed Rawls on the role of the family in a just society, and after the publication of *Political Liberalism* Rawls came close to agreeing that just families are necessary for a just society.¹⁵ Rawls explicitly borrows the idea from John Stuart Mill: if inequality and patriarchy are taught and practiced at home, it hardly seems possible to think that patriarchy will not dominate in public as well, which means that society will not be just. Since the family is so important, Rawls says that it is part of the basic structure of society, and since the principles of justice apply to the basic structure, the implication seems clear. Rawls's enlistment of Mill is striking, since in *Political Liberalism* he explicitly contrasts his argument with what he calls Mill's (and Kant's) comprehensive liberalism.¹⁶ Yet Rawls also argues that the principles of justice do not "apply directly to the internal life of the family."¹⁷ Rawls wants to protect associational life from the principles of justice so people can order their affairs according to their comprehensive views, but he also argues that the family plays an important part in constructing a just society.

I don't want to settle the issue of Rawls and the family here,¹⁸ but I do want to point out that Rawls's views vacillate because of his conception of stability: he wants to construct a polity that accepts disagreement on a wide variety of issues, but contains widespread agreement about justice. This formula only works, however, if the scope of justice is very narrow. Problematically, however, Rawls keeps finding that a liberal conception of justice is rather robust. Stability requires agreement around a small set of issues; liberal justice demands agreement on a large set. Rawls never understands this tension that looms in his work. In some ways, this begs a larger question: why would one think that agreement on justice is necessary for stability? Stability and justice might pull us in different directions, not the same. As Jeremy Waldron notes, Rawls's argument about the two is particularly odd since Rawls maintains that we need political philosophy to help us wade through our disagreements, and

15 Susan M. Okin, *Political Liberalism, Justice and Gender*, 105 *ETHICS* 23 (1994); SUSAN MOLLER OKIN, *JUSTICE, GENDER, AND THE FAMILY* (1989); see also Corey Brettschneider, *The Politics of the Personal: A Liberal Approach*, 101 *AM. POL. SCI. REV.* 19 (2007).

16 RAWLS, *supra* note 1, at 199.

17 RAWLS, *supra* note 6, at 159.

18 A good analysis of the tensions in Rawls's argument is Ruth Abbey, *Back Toward a Comprehensive Liberalism? Justice as Fairness, Gender and Families*, 35 *POL. THEORY* 5 (2007).

that in fact few of us agree to the same principles of justice.¹⁹ Despite Rawls's recognition of our disagreements, when his discussion turns to stability and to public reason, he insists that agreement on justice is a predicate of legitimacy and stability. Rawls argues that a state that has considerable agreement on justice is one where citizens agree to the rules voluntarily and not through force; and it is this voluntary agreement that is the basis for legitimacy. A legitimate government, one with widespread agreement on justice, will also be stable.

Yet disagreements in modern societies run deep: not only over religion, but also on the role of government, the common good, the proper relationship between economics and politics, and so on. Many of these matters, of course, feed into people's conceptions of justice, which inevitably diverge. Rawls's conception of justice aspires to regulate liberty, the economic structure of society, family life, and public reason (the reason of the courts, and the appeals made by politicians, and the reasons why citizens cast their votes), and so cannot be viewed as circumscribed, or as an ideal that readily lends itself to a near consensus in society. Why Rawls thinks that agreement on such a wide range of issues is feasible is hard to imagine. It is also unclear why such widespread agreement is necessary for stability. Indeed, Rawls's insistence that agreement on justice is needed for legitimacy could have the perverse effect of making many democratic regimes illegitimate. If citizens accept Rawls's definition of legitimacy, and widespread disagreement about justice continues, as is likely, then many would view their regimes as illegitimate, which might then cause instability. Rawls gives us no reason to think that the widespread current disagreement about justice among people in Western democracies will disappear any time soon.

These Western democracies are stable, despite the disagreements they contain; nor does Rawls suggest that these regimes are either unstable or rule by coercion. These democracies do suggest that one route to stability (and legitimacy) is to determine fair procedures to settle our disagreements — meaning that the polity decides whose views will reign (at least until the next vote), not that everyone will agree on these procedures.²⁰ Inevitably, this will sometimes mean compromises over justice, as different elected officials bargain, negotiate and compromise with one another. Or we might follow Locke (who was very concerned with stability despite Rawls's belief that the

19 JEREMY WALDRON, *LAW AND DISAGREEMENT* 149-63 (1999).

20 Waldron, *id.*, does not quite make this point but is quite illuminating in general about the role of agreement and disagreement.

issue has rarely been discussed by political philosopher²¹) and argue that we need to remove points of contention from the public sphere if at all possible. By this argument, stability is best achieved when irresolvable controversies are removed from the public sphere.²² It is the case as well that sometimes coercion will be needed to ensure stability, though the aim of a liberal democracy should be to minimize force. These two strategies, removing contentious arguments from the public and trying to reach agreement on procedures, might be deployed by the same polity in different circumstances. The state might try to avoid having to decide controversial issues, but when it does it may try to ensure that the procedures it uses are seen as fair by as many citizens as possible, instead of trying to establish rules that call some points of view illegitimate and trying to converge on a single, shared conception of justice.

By conflating justice with stability, Rawls is unable to say how much of one he might be willing to sacrifice for the other, or what kind of trade-offs liberal states may have to consider between different values, like justice and stability. The desire for one overriding value, justice in this case, is bound to be resisted by many in the liberal state, unless it is very narrowly defined. It may be that justice and stability pull in different directions, and that liberal citizens will have to accept compromises over justice — or sometimes accept versions of justice that they disagree with — for the sake of stability. Reaching stability may mean a more restrained version of justice than Rawls offers.

III. RULES AND DISCRIMINATION: THE PROBLEM WITH CONGRUENCE

One alternative to Rawlsian ambiguity is simply to say that liberalism will tolerate religions as long as they are liberal. This seems to be Susan Okin's position, but I want to examine two feminists who are committed to liberal principles but do not simply look upon religion as a hindrance as Okin does.²³ The arguments of both Martha Nussbaum and Ayelet Shachar highlight the tensions between liberal ideals and many religions. I will argue that both of their arguments, however, want too much congruence between liberal values and religion. It is important to note that my argument applies to liberal states. Several of Nussbaum's and Shachar's examples come from India and Israel,

21 RAWLS, *supra* note 1, at xvii.

22 STEPHEN HOLMES, PASSIONS AND CONSTRAINTS: ON THE THEORY OF LIBERAL DEMOCRACY 202-35 (1995).

23 SUSAN MOLLER OKIN, IS MULTICULTURALISM BAD FOR WOMEN? (1999).

where religious family law is enforced by the state. In a liberal regime, people ought to be able to choose if their marriage is to be religiously governed or not. This choice is mostly unavailable in India and Israel, however, and so the political analysis of the situation must differ than in liberal states. Nussbaum particularly moves seamlessly from liberal to non-liberal or partly liberal contexts. She begins her arguments about religion by noting a tension within liberalism between freedom of religion on one hand and the need to safeguard rights on the other.²⁴ Yet many of Nussbaum's examples do not highlight this tension. When women are threatened with violence for violating religious law (Bangladesh) or when the state enforces a religious dress code (Iran), or when rape complainants are themselves sentenced to jail (Pakistan) Nussbaum wrongly claims this is an "apparent dilemma for the liberal regime."²⁵ Violence in the name of religion is not sanctioned by liberalism, nor are "modest" dress codes or the dismissal of accusations of rape. Liberalism insists upon freedom to and from religion. The freedom that religion has in the liberal state is predicated on the religion itself not having any coercive authority. If a religion has coercive authority, the dictates of liberalism are violated; if violence is threatened by some religious members, the fact that the threat is made between co-religionists does not make the threat less of a crime under liberalism.

Nussbaum wants to differentiate herself from what she calls the secular humanist feminism like that of Okin and argues for the importance of respecting religions. Respecting religion, Nussbaum insists, is part of what it means to respect people.²⁶ She argues that religion has an important place in the liberal polity, but this is predicated on religions having certain attributes: namely, that they transmit and foster moral views on the conduct of life in a particular, broadly liberal, way. They should embody an "idea of compassion for human suffering, and an idea that it is wrong for innocent people to suffer," and some notion of justice (that presumably attempts "to improve the conduct of life").²⁷ Nussbaum nearly dismisses the idea that an unjust act can be religious: "whatever they think about the religious character of their acts, if the acts are unjust we must be highly skeptical."²⁸ Religions too cannot endorse intolerance — if religious actors claim this is what religion requires, "we may conclude that they are in error."²⁹ Critically, the argument here is

24 MARTHA C. NUSSBAUM, *SEX AND SOCIAL JUSTICE* (1999).

25 *Id.* at 84.

26 MARTHA C. NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH* 180 (2000).

27 *Id.* at 199.

28 *Id.* at 196.

29 *Id.* at 195.

not merely that religious traditions are diverse — an argument that Nussbaum also makes — but that religions that advocate injustice (by liberal standards) do not even have the right to claim to be religious.

One might read Nussbaum as arguing that religion has a special place in the polity because of its role in establishing or maintaining morality. If Nussbaum means this, though, she can only do so by defining religion in a certain way. Religions are about many things — obeying God, following rituals, and so on — and while some may have aspirations to justice, not all do. Justice is only one of many aspects of some religions. Nussbaum certainly knows this, having spent considerable time in India; Hinduism is a religion centered around practice much more than belief and morality.³⁰ Nussbaum's argument oddly suggests that religion should be the handmaiden of justice — her version of justice is close to Rawls's — though why religions should be thought of in terms of justice is unclear. By making religion subservient to liberal justice, Nussbaum tries to avoid the charge of religious intolerance, since on her argument non-liberal religions aren't really religions at all. This is not the case, of course; what it really means is that non-liberal religions will have a hard time surviving in Nussbaum's world, and that much of the internal structure of religions should mirror liberalism: they should be egalitarian, and should strive for social justice.

Liberal religions, however, also have a hard time surviving in such a liberal world. This is not because liberalism is hostile to liberal religions, but rather because there is so much congruence between liberalism and liberal religions that many members of liberal religions see no compelling reason to remain members. Some do, of course. But when the teachings of the church match those of the wider society, and the church does not offer a set of distinctive practices, the reasons to belong to it are weak.³¹ People still join for reasons of belief and for a desire for community, but it is clearly not an accident that for the past several decades in the U.S., the more conservative churches are gaining members while the liberal ones are losing them.³² In Europe, the weakness of conservative churches is matched by the weakness of liberal churches. In other words, where conservative churches are weak in a liberal society, there is not much religion left to tolerate. If the

30 GAVIN FLOOD, AN INTRODUCTION TO HINDUISM (1996). I explore the relationship between Hinduism and liberalism in Jeff Spinner-Halev, *Hinduism, Christianity, and Liberal Religious Toleration*, 33 POL. THEORY 28 (2005).

31 SPINNER-HALEV, *supra* note 10, at 214-19.

32 Robin D. Perrin, Paul Kennedy & Donald E. Miller, *Examining the Sources of Conservative Church Growth: Where Are the New Evangelical Movements Getting Their Numbers?*, 36 J. SCI. STUD. RELIGION 71 (1997).

point of religion is to be a handmaiden of liberalism, then it is hard to see why religions will survive in any kind of substantial way in a liberal world. If liberalism is going to take the ideas of liberty and toleration seriously, it must be prepared to tolerate non-liberal religions. To happily announce that liberals will tolerate liberals is to hollow out the meaning of toleration.

Ayelet Shachar also tries to carve out a space for religion, but wants to do so in a way that protects vulnerable group members. Shachar argues for the importance of identity groups, which includes religious groups, but she also supports women's equality. She criticizes Okin's approach for unfairly leading to the fading of religious groups.³³ Shachar also argues against the liberal solution of exit, which posits that an unsatisfied group member can leave the group. Shachar maintains that this solution leads people to the overly harsh choice of picking either their culture or their rights. Many women, she argues, want to remain in their religious group, but without the discrimination they face within it. They do not want to choose their culture or their rights, but want their rights protected within their culture. Shachar wants to recognize the importance of group membership in people's lives, but she wants these groups to be non-oppressive.

Shachar's solution is what she calls "sharing jurisdictional authority" or the "joint governance" approach.³⁴ Under this compromise, the state will have some authority over some issues, while the group will have authority over others, following what she calls the "no monopoly rule." The particular formula of how jurisdictions can be shared is context dependent, and so no global rules can be given on how this is done. Yet Shachar is clearly interested in the most vulnerable members of groups. When her joint governance approach "is working effectively to make power-holders more accountable to their constituents, the onus is on group leaders to respond to 'alternative' voices within the group, and thus lead to the internal transformation of the group's *nomos*."³⁵ Shachar's intent is clear — making inegalitarian groups more egalitarian — yet she contends that her approach "refrains from forcing externally imposed norms on the group." She argues that "instead of forceful intervention," her approach "seeks to create institutional conditions where the group recognizes that its own survival depends on its revoking certain discriminatory practices."³⁶ In her contribution to this volume, Shachar says that it is fine to allow for *nomoi* groups to use their own rules to govern

33 AYELET SHACHAR, MULTICULTURAL JURISDICTIONS: CULTURAL DIFFERENCES AND WOMEN'S RIGHTS 65-68 (2001).

34 *Id.* at 88-116.

35 *Id.* at 124.

36 *Id.* at 125.

various aspects of life (particularly family law), as long as doing so bolsters "a moderate interpretation of the tradition . . . by religious arbitrators."³⁷ This is surely an odd understanding of force: the group is not forced to change, but if it does not, it will not survive. Unsurprisingly, Shachar argues that her goal is to make inegalitarian group practices "more costly to the group."³⁸

Shachar's intent is clear: she wants the state only to preserve identity groups, but she also wants the state to push these groups in a more liberal and democratic direction. While I am sympathetic to the idea that it is better if groups are internally egalitarian, the state has no right to enforce this egalitarianism in private settings. I will argue below that it is the group's members who ought to shape the contours of the group, not the state. Shachar resists the argument that if religion cannot be a force for good we are better off without it, but she does want to ensure that religious law is allowed in a liberal state only as long as it supports "state-backed rights."³⁹

One could grant that certain practices and rituals are important to religion, but argue that they need not be internally inegalitarian. In other words, one could have religions that are both internally egalitarian but non-liberal. One could follow dietary restrictions, pray communally at the prescribed times and in the prescribed way, and celebrate holidays without discriminating against women. One might say that family law is a separate concept, while other traditional practices may keep a religion conservative without being patriarchal; there is no reason to think that it is discriminatory family law that is the fulcrum that underpins traditional religions. There is some force to this argument, but it is nonetheless limited, since the argument leads inexorably to giving the state the power to define religion, a power a liberal state should resist.

What marks out many conservative religions is that they are ruled and rules discriminate in all kinds of ways. They define acceptable and non-acceptable behavior; they inform members what rituals to perform and when; they suggest whom their members can and cannot marry. And they help determine who is and who is not a member. One route to maintaining membership is by following the rules: adhering to the right dietary laws or performing the right rituals. Conversely, a member who does not eat the right foods or perform the right rituals may place him or herself outside the community. To be sure, membership need not only be determined by

37 Ayelet Shachar, *Privatizing Diversity: A Cautionary Tale from Religious Arbitration in Family Law*, 9 THEORETICAL INQUIRIES L. 573 (2008).

38 SHACHAR, *supra* note 33, at 126.

39 Shachar, *supra* note 37, at 602.

behavior; religious groups have wide latitude in defining themselves. One could easily interpret some membership rules as discriminatory (though not necessarily in gendered terms). Part of the disagreement between Reform and Orthodox Judaism is about the rules of conversion and who counts as a convert. Unsurprisingly, liberal religions have fewer rules than conservative ones. Some non-Orthodox synagogues have debated the roles of non-Jewish members (usually spouses or partners of Jewish members) — should they vote at business meetings, what role should they have in services? These members are the victims of discrimination when they cannot vote or serve on certain synagogue committees or are barred from doing certain things at services that Jewish members can do.⁴⁰ Discrimination based on religion, of course, generally counters liberal principles, and it is the marginalized that face this discrimination.

Religious groups ought to be able to define their membership as they wish, however. If some members of a synagogue dislike the practice of excluding non-Jews from leading services, and cannot convince the group to change, the proper liberal response surely is not that the state should pressure or force the group to change its practices, but that the disgruntled members should leave the group and form or join another. This is such a canonical liberal principle that it needs little defense, except to note that to allow the state to determine the rules of membership a religion should have is a clear violation of religious liberty and religious toleration. Reform, Reconstructionist and Conservative Judaism broke off from Orthodoxy; Protestant Christianity has many variations; there are different kinds of Islam. If the state grants religious liberty, there is every reason to expect multiple traditions to arise. There is also no reason to think that in a society of many religious traditions, many or all religions will internally match liberal justice. There are limits to what religion can do, of course — physical harm in the name of religion, for example, should not be allowed in a liberal state. If religious liberty is to have any meaning, however, it will often mean that some people will live part of their lives in an illiberal fashion.

Certainly a reply to this is that many women do not want to exit; they wish to remain members of the group, but under conditions of equality. They do not aspire to change all the rules of the group, or even most of them, simply a small subset. As Menny Mautner argues in his contribution to this issue, changing a small number of rules of, say, Ultra-Orthodox Jews, does

⁴⁰ See Carol Towarnicky, *Report on the Role of the Non-Jew in Reconstructionist Synagogues*, JRF Q. (1998), <http://www.jrf.org/rt/boundaries.html>.

not mean transforming the group into something else altogether.⁴¹ A second, complementary objection is to argue that exit is a socially conditioned choice: it is the rules of the state that allows the group to exist, and so the state allows for exit. If the state is complicit in allowing for exit, why cannot it be complicit in ensuring that groups treat their members fairly? I want to try to answer both of these objections together.

IV. PLURALISM, EDUCATION AND EXIT

If we want, as Rawls does, a regime whose citizens accept its legitimacy with minimal coercion, then we must balance liberty, toleration, equality, stability and justice. The argument of Rawls, Nussbaum and (to perhaps a lesser degree) Shachar is that one value trumps all. (While I have limited my net here, it could easily be cast wider: Susan Okin wants equality above all; Will Kymlicka appoints autonomy as the liberal King; Chandran Kukathas argues that toleration is the pre-eminent value.⁴²) The appointment of one value as the triumphant one, however, allows the danger of a too powerful state. That the state "allows" a group to exist is for the most part beside the point. A liberal state needs to be a restrained state; limited government is a hallmark of liberalism in order to prevent tyranny. If people choose to belong to institutions that eschew equality, it is not clear why the state should involve itself in this choice. A liberal democratic state ought to be committed to the idea of equality, but this does not mean imposing equality wherever it can; it does mean that the idea of equality should be invested in public institutions.

The alternative is for the state to reach far into the lives of its citizens. When the rules of a religion are at stake, many quarrels can arise, but one would be hard pressed to say that the state should involve itself in them. The state should not tell a religion what dietary rules it should follow (as long as these rules do not violate general state laws), nor what rituals it should perform, nor who should be a member. Religious liberty is not absolute, of course, but neither should the ideals of equality and justice be absolute. We also know that a vibrant civil society aids democratic values in a number of ways, and this is sometimes true in patriarchal institutions, like churches.

41 Menacham Mautner, *From "Honor" to "Dignity": How Should a Liberal State Treat Non-Liberal Cultural Groups?*, 9 THEORETICAL INQUIRIES L. 643 (2008).

42 CHANDRAN KUKATHAS, *LIBERAL ARCHIPELAGO: A THEORY OF DIVERSITY AND FREEDOM* (2003); WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* (1995); Susan Moller Okin, *Feminism and Multiculturalism: Some Tensions*, 108 ETHICS 661 (1998).

Many Baptist churches, for example, are patriarchal, yet they give many women important opportunities to learn a variety of skills, since women participate in church activities in larger numbers than men.⁴³

It is the case that the members of churches, synagogues and mosques themselves can press for more egalitarian rules, as certainly many have, which partly explains the different varieties of Judaism, Christianity and Islam. The state is not the only entity that ought to pursue justice; a regime will have more legitimacy if the rules of its private organizations are altered by the members themselves, and not by an outside force. We can see this happening within Modern Jewish Orthodoxy, with the emergence of the Jewish Orthodox Feminist Alliance.⁴⁴ There are now Jewish women who have trained to be Halachic advisors, giving out Halachic advice to Orthodox Jewish women, a recent innovation.⁴⁵ While progress does not always come fast, the attempt to carve out how a conservative religion should accommodate egalitarian demands is best left up to the religion and its members, not the state. How to do this is a complicated and tricky matter; the path toward a more egalitarian Orthodox Judaism is too subtle for the state's involvement. The same is true of membership rules for groups; they are best left up to the group to decide, not the state. The danger of the state getting involved is that it will insist that all of the groups within it be liberal all the way down.

There are three key conditions under which groups can discriminate against their members. First, the society must be a pluralistic one. Second, exit from groups must be assured, which suggests the third, a decent education. A decent education is an education that will allow people to make a reasonable living outside the community if they so choose. All children should receive a decent education. The demands of a decent education will partly depend on the skills they learn in the community. If they learn to be farmers or artisans, then the demands of an education are less than if they learn to be Torah scholars. The key here is that it should take only a

43 SIDNEY VERBA, KAY LEHMAN SCHLOZMAN & HENRY E. BRADY, VOICE AND EQUALITY: CIVIC VOLUNTARISM IN AMERICAN POLITICS 304-33 (1995). On the importance of civil society, see ROBERT PUTNAM, MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY (1993); NANCY ROSENBLUM, MEMBERSHIP AND MORALS: THE PERSONAL USES OF PLURALISM IN AMERICA (1998).

44 See JOFA, <http://www.jofa.org/> (last visited Oct. 2, 2007).

45 These advisors train at Nishmat: The Jerusalem Center for Advanced Jewish Studies for Women, which is described at Nishmat, <http://www.nishmat.net/about.php> (last visited July 27, 2007); the innovative character of women halachic advisors is noted in Barbara Sofer, *The Human Spirit: Can Women Decide Halacha?*, JERUSALEM POST ONLINE EDITION, May 11, 2006, available at <http://www.nishmat.net/CanWomenDecideHalacha.pdf>.

short time of preparation after exit for the ex-members to make their way in liberal society. For all students, though, basic literacy and knowledge of basic math and science is essential. A basic civic education should also be given, though one must be skeptical of how meaningful it will be if taught in an environment hostile to the state. An important way to ensure that religious conservative women understand they have a choice about their lives is for them to see other women receiving sophisticated educations, working at jobs beyond those of traditional female occupations, and to see women in positions of power. This will mean strong anti-discriminatory laws, and sometimes affirmative action laws, until a critical mass of women are in positions of power. It is certainly the case that it is nearly impossible for most people living within the Western democracies today to not know that there are alternative ways of life to the traditional household. The idea of a Jewish Orthodox feminist group is relatively new and is clearly influenced by the non-Orthodox. The private sphere is rarely insular; ideas move in different directions, and it is unsurprising when ideas filter between the two.

Knowing that these alternatives exist and feeling able or willing to choose them are two different matters. Indeed, many American residents of poor inner city communities may know they have a formal right to leave, yet both women and men often feel trapped within them. In fact, lacking access to a decent education and to employment opportunities, many inner city residents cannot leave. By contrast, even if people in conservative religious communities are not given the kind of education that will enable them to readily become astronauts or concert pianists, many have gained the habits and discipline that will allow them to succeed in the outside world. Still, one might point to some communities where the pressure to stay is large and the chances to leave slim. There are, certainly, many people in immigrant communities who will feel especially disempowered to leave. A Muslim immigrant in Denmark or France may understand that Danish or French women have many choices before them, but she may believe that these other lives are alien to her. She may feel compelled to follow the rules of her community, even if she does not want to do so, since her grasp of the dominant community is fleeting.

Here, however, as long as the community does not forcibly prevent exit, the solution is not to interfere in the rules of the community — particularly in a community that feels vulnerable on many grounds. One possible and unfortunate effect of such interference would be what Shachar calls "reactive culturalism": in the face of pressure to become more liberal, some groups may

respond by redoubling their efforts to withstand this pressure.⁴⁶ The route for many immigrant communities in Europe, like in inner cities in the U.S., is to find ways to increase employment and deliver better quality education to the members of these vulnerable communities. When this occurs, it is likely that the community will diversify; some members will become integrated in the mainstream community, some will try to retain their community's rules and boundaries, and others will navigate between these two poles. What is important then is not that there be merely different ways of life in a liberal state, but that there be variations of different communities within the state, rather than one dominant Muslim or Jewish or Christian community. Many members of traditional Muslim communities in Europe may want a more open community, but this need not mean they want to leave the Muslim community behind; what they may want is to live in a more innovative Muslim community. In a state that is able to provide education and job opportunities on a fair basis to its citizens, these citizens will feel empowered to find their own religious way. Instead of making a religious community responsive to a particular subset, a better liberal response is to establish the conditions that allow for different variants of religions to thrive. This means a less intrusive state, and a meaningful religious liberty.

Even a firmly egalitarian public, however, does not excuse certain practices. All associations must allow for exit. Ensuring this option will certainly sometimes mean interfering with religion, and as such some religious conservatives will find my argument insufficient. The intent of my argument, however, is to fulfill the liberal attachment to autonomy and equality as much as possible, while allowing for religious liberty, including the right to conservative religions. By autonomy, I mean the liberal idea, taken from Mill and Kant, that people should be able to develop their talents and minds; that the autonomous person uses her reason to develop her moral nature and critical faculties. Liberty means the right to do what one wants, as long as it does not interfere with others. People may use liberty to develop their autonomy, but need not do so. The idea that public institutions should support autonomy and equality, while allowing for as much liberty in private as possible within the confines of the exit principle, does not always lend itself to exact answers. There are hard cases that will provoke disagreement among liberal pluralists, but all will want state interference in the internal life of groups scrutinized carefully.

One difficult determination is what constitutes sufficient background conditions for choice and exit. Liberal states should be firmly committed

⁴⁶ SHACHAR, *supra* note 33, at 35-37.

to educating and ensuring employment opportunities for all citizens; in practice this will often mean a particular commitment to women, though obviously exit for men is sometimes an issue as well. Once this is done, the state should interfere in religion as little as possible. One might insist that an education that will enable one to attend university is necessary for one to choose one's path in life. My argument resists the idea that every person must sample different ways of life before choosing one. Too often, autonomy is equated with a consumerist model of choice, according to which children need to sample a wide variety of possibilities before they commit to a choice. We do better, however, to place "independent thought and action rather than free choice at the center of our understanding of autonomy."⁴⁷ It's not clear that many liberal citizens are committed in any robust way to anything. The idea, popular with many liberal theorists, that liberal children must be confronted with a myriad of choices to be autonomous downplays the importance of thinking to autonomy.⁴⁸ The choices liberal citizens confront in the grocery store (Diet Coke or Coke Zero?) are not the sort of choices that are key to the autonomous life.

Citizens in a liberal regime do need to know that they have choices, which simply requires knowing that there are alternative ways to live; it does not mean sampling them all. Liberalism is committed to providing the minimal conditions necessary for people to reflect upon their choices. With religious groups, this means that members should have not only the right to leave, but also the knowledge that they can leave. Similarly, permanent physical harm should not be allowed; certain kinds of female circumcision should not be allowed in this regard, though more ceremonial kinds that do not leave permanent damage are another matter.⁴⁹ (Traditional male circumcision, with its fleeting pain, is not much of an issue, particularly now that we know it drastically reduces the risk of contracting AIDS.⁵⁰) Similarly, child marriages should not be allowed, as they crush a person's later choices in life.

Liberalism does not, however, have to make leaving one's community psychologically easy. While some argue that more intrusion in communities is necessary to make exit realistic,⁵¹ millions of people have left their religions

47 Shelley Burt, *Comprehensive Educations and the Liberal Understanding of Autonomy*, in *CITIZENSHIP AND EDUCATION IN LIBERAL-DEMOCRATIC SOCIETIES* 179, 184 (Kevin McDonough & Walter Feinberg eds., 2003).

48 See Burt's discussion of this matter in *id.*

49 JACOB LEVY, *THE MULTICULTURALISM OF FEAR* 52-56 (2000).

50 Donald G. McNeil, Jr., *Circumcision's Anti-AIDS Effect Found Greater than First Thought*, *N.Y. TIMES*, Feb. 23, 2007, available at <http://www.nytimes.com/2007/02/23/science/23hiv.html?ex=1329886800&en=a098a0c445f75f8d&ei=5090>.

51 Daniel Weinstock, *Exit Rights: Reframing the Debate*, in *MINORITIES WITHIN*

since the Reformation. People in liberal societies are often confronted with all kinds of tragic choices, to which liberal theory has few answers. People choose between their spouse and parents, or their children and career, or between one friend and another. The fact that a choice is hard to make, that it can yield tragic consequences, is not in and of itself a political issue.

MINORITIES: EQUALITY, RIGHTS, DIVERSITY 227 (Avigail Eisenberg & Jeff Spinner-Halev eds., 2004).